No. 08-567

Supreme Court, U.S.
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In The
Supreme Court of the United States

AGRIPOST, LLC, *et al.*,
Petitioners,

v.

MIAMI-DADE COUNTY, FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

The National Association of Home Builders ("NAHB") and Franklin P. Kottschade have received the parties' written consent to file this amici curiae brief supporting petitioners.[1] NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the shelter industry. As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 235,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and amicus curiae to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007). Attached at Appendix A to this brief is a list of cases in which

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

NAHB has participated before this Court as amicus curiae or "of counsel." A large number of those cases involved landowners and other parties aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

NAHB's organizational policies have long supported the rights of property owners to have their constitutional claims heard by federal courts. It is troubled by the tactic of government officials to use *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), as a shield against legitimate Fifth Amendment claims. Under the conventional interpretation of *Williamson*, aggrieved landowners must run a procedural gauntlet that precludes federal court adjudication on the merits of whether an unconstitutional taking has occurred in any given situation.

A case in point is Mr. Kottschade's litigation odyssey.[2] A homebuilder and developer from Rochester, Minnesota, he has negotiated and litigated the constitutionality of government land-use decisions on his property for almost a decade, in federal and state court, and no judicial forum has ever decided the merits of his case. After months of negotiating with local officials regarding the use of his property, the City imposed financially

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[2] A more detailed description of Mr. Kottschade's voyage through the federal and state court systems is provided in Br. of NAHB and Franklin P. Kottschade as Amici Curiae in Support of Pet'rs, *Braun v. Ann Arbor Charter Twp.*, No. 08-250 (filed Sept. 24, 2008), at 18-23.

ruinous conditions on Mr. Kottschade's proposed project to develop affordable residential townhomes. He thus filed suit in federal court in June 2001, seeking just compensation for a taking of his property under the Fifth Amendment.

However, the federal courts dismissed his case for not being ripe. In 2003, the Court of Appeals for the Eighth Circuit expressed some sympathy for the jurisdictional Catch-22 that *Williamson* causes for takings plaintiffs, but its compassion only went so deep and it denied Mr. Kottschade federal court access. *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"). Subsequently, this Court denied Mr. Kottschade's petition for certiorari. 540 U.S. 825 (2003). He remains mired in litigation, now in state court, and has yet to receive a decision on the merits from *any* court.

To bring attention to the jurisprudential dilemma caused by *Williamson*, Mr. Kottschade has testified before Congress to advocate for legislative reform that would confer upon property owners the right to federal court adjudication on Fifth Amendment takings claims, without an initial detour in state court. See *Private Property Rights Implementation Act of 2005: Hearing on H.R. 4772 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Franklin P. Kottschade, President, North American Realty).

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE FOR THE SAME REASONS THAT IT SHOULD ACCEPT REVIEW IN *BRAUN V. ANN ARBOR TOWNSHIP*, NO. 08-250.

A pending certiorari petition in *Braun v. Ann Arbor Charter Twp.*, No. 08-250, seeks review of a Sixth Circuit decision that blocked federal court access for a property owner who tried to vindicate a takings claim in federal court. NAHB and Mr. Kottschade also filed an amici brief in that matter, which we fully incorporate here, urging the Court to reassess *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). See Br. of NAHB and Franklin P. Kottschade as Amici Curiae Supporting Pet'rs, *Braun v. Ann Arbor Twp.*, No. 08-250 (S. Ct. filed Sept. 24, 2008) ("NAHB *Braun* Amici Br."). For the same reasons that NAHB supports this Court's review in *Braun*, it supports review of the petition in the case at bench.

The first questions presented in the petitions for this case and *Braun* both request the Court to consider whether it should "overrule" the state-litigation rule announced in *Williamson*. Compare *Agripost* Pet. at i ("Should the Court overrule *Williamson* ... insofar as it denies property owners the right to litigate their federal causes of action in federal court ....") with *Braun* Pet. at i ("Should the Court overrule *Williamson* ... insofar as it requires

property owners to seek compensation in state court ...."). The state-litigation rule provides: "[If] a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." *Williamson*, 473 U.S. at 195. This language has been uniformly interpreted to apply to *judicial* procedures; a Fifth Amendment takings claim does not become ripe for federal court adjudication until the aggrieved property owner pursues inverse condemnation litigation in state court and loses.[3]

Both the petitions here and in *Braun* emphasize that four concurring Justices in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), stated that the state-litigation rule "may have been mistaken," and that "[i]t is not

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[3] *E.g., Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio, v. Flores Galarza*, 484 F.3d 1, 16-19 (1st Cir. 2007); *Southview Assocs. Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Brubaker v. E. Hempfield Twp.*, 234 Fed. Appx. 32, 36-37 (3d Cir. 2007); *Henry v. Jefferson County Planning Comm'n*, 34 Fed. Appx. 92, 96 (4th Cir. 2002); *Samaad v. City of Dallas*, 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005); *Peters v. Vill. of Clifton*, 498 F.3d 727, 731-734 (7th Cir 2007), *cert. denied*, 128 S. Ct. 1472 (2008); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *Yaklich v. Grand County*, 2008 WL 1986470 at *4-*6 (10th Cir. 2008); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1234 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000).

clear that *Williamson County* was correct in demanding" that a claimant must first seek a compensation remedy through state litigation as a prerequisite to ripen a federal takings claim. *Id.* at 348-349 (Rehnquist, C.J., concurring). The *San Remo* concurring Justices believed that *Williamson's* "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351. NAHB wholly concurs. The pending requests for certiorari in this case and *Braun* provide appropriate vehicles to resolve these anomalies,[4] which include the following.

A. Conflict Between *Williamson* and *San Remo* on Subsequent Versus Concurrent Takings Claims.

Tension is especially pronounced between *Williamson* and *San Remo*. The *Williamson* Court stated that exhaustion of state compensation procedures is a first step to ripen federal takings claims: "*[U]ntil* [plaintiff] has utilized [state] procedure[s], its takings claim is *premature*." *Williamson*, 473 U.S. at 197 (emphasis supplied).[5]

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[4] The lower courts routinely recognize the doctrinal conflicts left in *Williamson*'s wake. See, *e.g.*, *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"), *cert. denied*, 540 U.S. 825 (2003); *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998) ("It is difficult to reconcile the [state litigation] ripeness requirement of *Williamson*" with issue and claim preclusion).

[5] See also *Williamson*, 473 U.S. at 194 ("A second reason the takings claim is *not yet ripe* is that respondent did not seek

Virtually every court of appeals has interpreted this language to mean that a Fifth Amendment takings claim is not ripe — it does not exist — until a property owner has filed suit for inverse condemnation in state court and has been denied compensation. *Supra* n. 3. Many commentators also read *Williamson* as providing the opportunity for ultimate federal adjudication following denial of compensation in state court.[6]

The Court's opinion in *San Remo*, however, upends this widespread understanding. It declared that federal takings claims could, in fact, be asserted *during* a state lawsuit:

> The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so" ... does not preclude state courts from hearing *simultaneously* a plaintiff's

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compensation through the procedures the state has provided for doing so") (emphasis supplied); *id.* at 195 ("the property owner cannot claim a violation of the Just Compensation Clause *until it has used* the [available state] procedure and been denied just compensation") (emphasis supplied).

[6] See, *e.g.*, Steven J. Eagle, *Regulatory Takings*, 1062, 2d ed. (2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language ... suggests that the state law is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court").

> request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

San Remo, 545 U.S. at 346 (citing *Williamson*, 473 U.S. at 194) (emphasis supplied). Thus, while *Williamson* rules that a federal takings claim is not ripe until *after* the state denies compensation, *San Remo* rules that federal claims can be brought *simultaneously* with state claims in state court.

So, which is the rule? Are *Williamson* and *San Remo* reconcilable, or in hopeless conflict? How is it that a Fifth Amendment claim can be brought simultaneously with a state inverse condemnation claim in state court, if that federal claim is not ripe until *after* the state denies compensation? How would the process of bringing simultaneous claims work? Should the state and federal takings claims be brought in state court sequentially, in that order? Are they part of the same, or separate, lawsuits? What effect does *San Remo*'s simultaneous claim rule have on case law from the lower federal courts, cited *supra* n. 3, which have been virtually unanimous that Fifth Amendment takings claims are nascent and do not become ripe for adjudication until after state litigation is over? Are these opinions now overruled?

The petition should be granted so the Court can clarify the apparent contradictions between *Williamson*'s rule that state litigation is a condition

precedent to ripen a federal takings claim, and *San Remo*'s rule that federal and state takings cases can be brought simultaneously in state court.

B. Conflict Between *Williamson* and *City of Chicago*, on Removal Jurisdiction.

The NAHB *Braun* Amicus Br. at 11-12, and the *Agripost* Pet. at 22-25, both emphasize another anomaly arising from *Williamson* that demands resolution. The state-litigation rule is irreconcilable with this Court's view of removal jurisdiction from *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997). There, a plaintiff brought both federal and state takings claims in state court. The city then removed the case to federal court. This Court, without discussing *Williamson*, allowed the removal to stand because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 528-529. Under the federal removal statute,[7] a case can be removed from state to federal court only if it could have been brought in federal court *originally*.

Therein, the seeds of more conflict are sown. Under *Williamson*, federal courts do *not* have original jurisdiction over federal takings claims because they are not ripe until the property owner

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[7] "[A]ny civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant ... to the district court." 28 U.S.C. § 1441(a) (emphasis supplied.)

brings state litigation and loses. *San Remo* confirms that there is no original federal court jurisdiction over federal takings claims, and counsels that they may be brought simultaneously with state inverse condemnation claims in state court. Yet under *City of Chicago,* federal courts *do* have original jurisdiction over federal takings claims because a municipality may remove them to federal court. The consequence is that federal courts decide takings claims only at the whim of municipal defendants who decide to exercise their removal option. The petition should be granted to address the dilemma created by *Williamson, San Remo,* and *City of Chicago,* as to whether federal courts do, in fact, possess "original jurisdiction" over Fifth Amendment takings claims.

The conflict over *Williamson*'s rule that takings claims must go to state court first, and *City of Chicago*'s rule that takings claims can be brought originally in federal court, has predictably devolved into lower court confusion. Federal judges have split on whether they have jurisdiction to decide Fifth Amendment takings claims that bypass initial state litigation, due to case removal from state to federal court by local government defendants. The Seventh Circuit, on remand in *City of Chicago,* decided it could resolve a removed federal takings claim on the merits, despite the lack of prior state litigation. *Int'l Coll. of Surgeons v. City of Chicago,* 153 F.3d 356, 360 (7th Cir. 1998). In contrast, the Eighth Circuit has held it lacked jurisdiction over a federal takings claim that a municipal defendant removed to federal court,

precisely because no original state proceedings ripened the federal claim. The stunning aspect of this decision is that the federal court dismissed for lack of jurisdiction, even though the plaintiff filed initially in state court and was forced into federal court upon the city's removal motion. *Koscielski v. City of Minneapolis,* 435 F.3d 898, 903-904 (8th Cir. 2006). The Fifth Circuit has similarly whipsawed a takings plaintiff who filed suit originally in state court, only to see a municipal defendant remove the matter to federal court — and then argue for dismissal because *Williamson*'s state-litigation rule went unsatisfied. The city was rewarded for its chutzpah by dismissal of the case. *Sandy Creek Investors, Ltd. v. City of Jonestown,* 325 F.3d 623, 626 (5th Cir. 2003).

Constitutional rights are made illusory in this system of municipal gamesmanship, where courts and local governments bob and weave through a ripeness maze that allows them to hide from the merits of takings claims. A federal judge recently expressed his discontent with this state of affairs:

> *Williamson County* and *City of Chicago* are in direct conflict. Under *Williamson County,* a regulatory takings claim is not ripe until state litigation is complete. Thus, a regulatory takings claim cannot be the basis for removal from state court because the claim will never be ripe — removal will always occur prior to the completion of state litigation. However, *City of Chicago* permitted a regulatory takings claim to be

> removed. Either *City of Chicago* erroneously permitted removal, or *City of Chicago* implicitly held that the regulatory takings claim was ripe — a *sub silentio* elimination of the *Williamson County* State Litigation prong.

Del-Prairie Stock Farm, Inc. v. County of Walworth, 572 F.Supp.2d 1031, 1033 (E.D. Wis. 2008).

"[C]onsiderations of fairness and justice" lie at the heart of the Takings Clause. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002). It is neither fair nor just to allow a municipal defendant to remove a takings case to federal court, and then seek and receive a dismissal for lack of a prior state ripening suit. This Court's decisions are irreconcilable, and the circuits have thus become split on how to handle removed takings cases. This Court should address the conflict.

C. Conflict on Application of State-Litigation Rule to Other Constitutional Claims.

The lower federal courts also clash on whether the state-litigation rule applies to due process and equal protection claims, in addition to takings claims. In many constitutional property rights cases, plaintiffs assert some combination of takings, due process, and equal protection violations under 42 U.S.C. § 1983. In *Braun*, for example, the Sixth Circuit remarked it is unclear whether due process and equal protection claims

must satisfy *Williamson*'s exhaustion requirements. *Braun*, 519 F.3d at 572. While holding that the Brauns' procedural due process claims must satisfy the exhaustion requirements, the Sixth Circuit assumed the substantive due process claims do not. Furthermore, with respect to equal protection, *Braun* recognized that "conflicting case law exists" concerning whether *Williamson* applies. *Id.* at 574. In comparison, the Seventh Circuit has held that *Williamson*'s exhaustion requirement applies to both taking and substantive due process claims, yet not equal protection claims. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000); See also *Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987) (providing that state inverse condemnation claims must be exhausted for *both* federal takings and due process claims, without opining on equal protection.). Finally, some circuits restrict *Williamson*'s state remedies requirement to takings claims *only*.[8]

The Tenth Circuit has issued two, irreconcilable rulings on this point. It has applied *Williamson*'s state-litigation rule to takings and procedural due

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[8] See, *e.g.*, *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellants' facial [substantive due process] and [equal protection] claims"; citations omitted). Accord *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989); *Front Royal and Warren County Indus. Park v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (4th Cir. 1998); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

process claims brought under section 1983. See *Rocky Mountain Materials & Asphalt, Inc. v. Bd. of County Comm'rs of El Paso County*, 972 F.2d 309, 311 (10th Cir. 1992). Yet it has also ruled that the state-litigation rule is *not* applicable to any claims sounding in takings, due process, or equal protection, because a plaintiff "need not exhaust his available administrative remedies prior to filing a § 1983 action ...." See *Bateman v. City of W. Bountiful*, 89 F.3d 704, 708 (10th Cir. 1996). Accordingly, the lower court conflict on whether the state-litigation rule encompasses due process and equal protection (as well as takings) claims is another reason that justifies reconsideration of *Williamson*.

These anomalies – (1) the divergence between *Williamson* and *San Remo* on subsequent as opposed to concurrent federal takings claims, (2) the confusion on removal jurisdiction, and (3) whether state litigation must precede federal court review of due process and equal protection claims – when coupled with the preclusion doctrines of res judicata and collateral estoppel, all operate to bar judicial review of Fifth Amendment claims by *any* court. As former Chief Justice Rehnquist recognized, the state-litigation rule effectively "precludes litigants from asserting their federal claims even in state court." *San Remo*, 545 U.S. at 342, n. 2 (Rehnquist, C.J., concurring). This is because many states refuse to entertain federal takings claims until compensation is finally denied under state law, and collateral estoppel works to bar subsequent consideration of federal issues

because the state law issues were decided first. At the same time, *Williamson* (mal)functions so as to "ensure[ ] that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court ...." *Id.* at 351 (Rehnquist, C.J., concurring).[9]

If federal takings claims are to be decided exclusively by state courts, with no further access to federal court, then this Court should clearly state that is the case. If preclusion doctrines bar adjudication of a federal claim in state court *and* access to federal court after state proceedings, this Court should so declare. In short, whether *any* state or federal forum is open to decide the merits of Fifth Amendment takings claims – and if so *which* forum is the appropriate one to adjudicate a

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[9] This is exactly what has transpired. By the mid-1990s, the lower federal courts overwhelmingly invoked the state-litigation rule to avoid adjudicating the merits of Fifth Amendment takings claims. See John Delaney and Duane Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs can Enter the Federal Courthouse*, 31 Urb. Law. 195, 203-205 (Spring 1999) (surveying all land-use takings cases with a federal court decision from 1990-1998). As a preeminent takings scholar testified before Congress, the lower federal courts have exhibited "wholesale abdication of federal jurisdiction" over Fifth Amendment claims and have achieved the "undeserved and unwarranted result [of] avoid[ing] the vast majority of takings cases on their merits." *Private Prop. Rights Implementation Act of 2005: Hearing on H.R. 1534 Before the Subcomm. on Courts and Intellectual Prop. of the H. Judiciary Comm.*, 105th Cong. 67 (1997) (test. of Prof. Daniel R. Mandelker), *reprinted in* 31 Urb. Law. 234 (Summer 1999).

Bill of Rights provision – are significant constitutional question for this Court to clarify.

II. THIS CASE SQUARELY QUESTIONS THE VALIDITY OF THE STATE-LITIGATION RULE.

The decision below provides a textbook example of *Williamson*'s effect in barring federal courts from deciding Fifth Amendment takings claims on their merits. While the state-litigation rule was not teed-up for this Court's consideration in *San Remo*, it is directly in play in the case at bench. Here, Petitioners' land-use permit was revoked, they filed suit in state court over the revocation, and they lost. *Agripost, LLC v. Miami-Dade County,* 525 F.3d 1049, 1051 (11th Cir. 2008). Petitioners then sought Fifth Amendment just compensation in federal court; that claim was dismissed as unripe *à la Williamson* because the compensation remedy was never sought in state court first. *Id.* Returning to state court on a state law inverse condemnation claim (while reserving the Fifth Amendment claim for subsequent federal review), Petitioners were denied compensation because they were found to not have a protectable property interest. *Id.* at 1052.

A final foray back to federal court proved futile, as the court of appeals decided that issue preclusion barred adjudication on the merits of the Fifth Amendment cause of action. *Id.* at 1056. Thus, after two rounds of litigation through the federal and state systems, the ironic synergy

between *Williamson*'s state-litigation rule and preclusion doctrine worked yet again to deprive a property owner the benefit of a federal review on the merits of a Bill of Rights claim.

In *San Remo,* many *amici* (including NAHB) urged the Court to directly confront *Williamson.* But the invitation was declined because "no court below ha[d] addressed the correctness of *Williamson County,* neither party ha[d] asked us to reconsider it, and resolving the issue could not [have] benefit[ed] petitioners." *San Remo,* 545 U.S. at 352. (Rehnquist, C.J., concurring). The converse is true here. First, the court of appeals *did* consider *Williamson*'s impact,[10] and second, the petition's first question plainly asks the Court to reassess the state-litigation rule.

Third, resolving the issue would benefit Petitioners. If the Court reconsiders the state-litigation rule and removes it from the ripeness landscape, a remand would be appropriate to allow Petitioners the right of a federal jury trial under the Seventh Amendment to develop their takings claim on a complete factual record. See *City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 719 (1999) (takings plaintiffs in Section 1983 litigation have a Seventh Amendment right to a jury trial on issues of government liability).

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[10] "In short, the interaction of [the Full Faith and Credit Statute, 28 U.S.C.] § 1738 and *Williamson County* might deprive the plaintiff of the chance to litigate his Takings Clause claim in a federal forum ...." *Agripost,* 525 F.3d at 1052 (emphasis supplied).

To date, the Court has denied at least eight petitions for certiorari requesting review of *Williamson* since the *San Remo* decision.[11] At this juncture, further postponing review will not contribute to resolution of the open questions generated by *Williamson*, inconsistencies within this Court's takings jurisprudence will linger, and conflicting lower court decisions will proliferate. Respectfully, NAHB encourages this Court to grant the petitions in *Agripost* and *Braun*, reconsider the state-litigation element of *Williamson*'s ripeness doctrine — and dispense with it.

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[11] See *Johnson v. City of Shorewood*, 2008 WL 434680 (Minn. Ct. App. 2008), *cert. denied*, 129 S. Ct. 281 (2008) *Border Bus. Park, Inc. v. City of San Diego*, 49 Cal. Rptr. 3d 259 (Cal. Ct. App. 2007), *cert. denied*, 127 S. Ct. 2280 (2007), *Hillsboro Props. et al. v. City of Rohnert Park et al.*, 41 Cal. Rptr. 3d 441 (Cal. Ct. App. 2006), *cert. denied*, 127 S. Ct. 836 (2006), *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 415 (2007), *Torromeo v. Town of Fremont, N.H.*, 438 F.3d 113 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 257 (2006), *Peters v. Vill. of Clifton*, 498 F.3d 727 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1472 (2008), *McNamara v. City of Rittman*, 473 F.3d 633 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 67 (2007), *City of Marion v. Howard*, 855 N.E. 2d 994 (Ind. 2006), *cert. denied*, 126 S. Ct. 2358 (2006).

CONCLUSION

It is time to end the fiction that the Fifth Amendment requires a litigant to run an initial gauntlet through the state court system before the constitutional takings claim ripens. The exercise of constitutional rights can, and often does, hinge on traditionally "local" issues. Yet these highly parochial concerns face no barriers to federal court jurisdiction outside the takings context. For example, the First Amendment does not protect all speech; obscene material is not protected. Whether an artistic or literary work is obscene is determined by "contemporary community standards" and definitions under the "applicable state law." *See Miller v. California,* 413 U.S. 15, 24 (1973). In the First Amendment arena, there is no requirement that a plaintiff litigate such provincial matters in state court first before the doors to the federal courthouse are unlocked.

Why should a takings litigant be treated differently? The Fifth Amendment certainly does not say, "nor shall private property be taken for public use without the payment of just compensation, *where a demand for such compensation is first made in a state court.*" This Court "see[s] no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation ...." *Dolan v. City of Tigard,* 512 U.S. 374, 393 (1994). With respect, that is an empty sentiment if the substance of the Takings Clause

cannot be interpreted by, and a property owner cannot seek the constitutionally-mandated remedy of just compensation in, the federal judiciary.

When *Williamson* was decided in 1985, this Court's modern takings jurisprudence was still in its infancy. Indeed, only after *Williamson,* in *First English Evangelical Lutheran Church of Glendale v. Los Angeles,* 482 U.S. 304 (1987), did this Court even decide that monetary compensation was the self-effecting remedy required by the Takings Clause. Since then, the contours of the Fifth Amendment's substantive protections have become somewhat more defined by this Court, but the most basic, fundamental jurisdictional question — "Can a federal court ever decide a federal takings claim?" — remains undeciphered.

This question of whether Fifth Amendment takings litigants can access the federal courts is of overwhelming constitutional importance.

For the foregoing reasons, the petitions in the case at bench, and in No. 08-250, should both be granted.

November 21, 2008.

Respectfully submitted,

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APPENDIX

APPENDIX A

Cases in which NAHB has appeared as an amicus curiae or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987); *Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Franconia Assocs. v. United States,* 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005); *Kelo v. City of New London,* 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl.*

Prot., 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States*, 128 S.Ct. 750 (2008); *Winter v. Nat. Res. Def. Council*, 2008 WL 4862464 (U.S. Nov. 12, 2008); *Summers v. Earth Island Inst.*, 490 F.3d 687 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 1118 (2008) (No. 07-463); *Entergy Corp. v. Envtl. Prot. Agency*, 475 F.3d 83 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); and *Coeur Alaska, Inc. v. S.E. Alaska Cons. Council*, 486 F.3d 638 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2995 (2008) (No. 07-984, consol. with 07-990).